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博 士 学 位 论 文

私生活权研究

A Research on the Right of Privacy

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内 容 摘 要

自从 19 世纪末期私生活权被作为一项法律权利类型提出以来，现今私生活权的保护已经成为世界各国法学界备受关注的话题。相对而言，我国对私生活权的关注和研究起步较晚，在当前的法学理论和司法实践中存在许多问题亟需澄清。本文主要目的是厘清并纠正当前法学界对域外私生活权存在的曲解，并对私生活权法律保护的本土化提出了一些有意义的思考。

在前言中，为了避免以“私生活（权）”作为“Privacy”的对应语汇的突兀，作者以西方语言相关词语的释义、国际人权文件西方语言表述的一致性以及中文本的表述不一致性作为切入点，提出了“Privacy”的精确中文语汇应为“私生活（权）”。

在第一章中，作者探讨了“隐私”一词的产生及“隐私权”概念的形成、我国学界对“Privacy”制度进行限缩和部门法趋向。主要论证以下内容：第一，指出“隐私”并非在汉语中古已有之，也非纯粹为了应对“Privacy”一词的引入而被创造出的一个概念，“隐私”是通过对汉语中的“隐”和“私”二字的词义的选取和组合所形成的一个新概念。第二，在早期，学者们虽然在名义上采用了“隐私权”，但对其内容的说明、权利性质上，学者们也大多将其界定为保障人的尊严和自由的基本人权，基本与西方对应制度一致；第三，在早期的国内学界，对西方“Privacy”制度的研究出现了前见性限缩——在权利性质上理解为一种具体人格权，在研究范围上主要集中在侵权行为法和人格权法。在后期的国内学界，出现了多部门法研究的现象，肢解了西方整体存在的私生活权。

在第二章中，作者探讨了国内学界私生活权制度研究状况、隐私（权）中核心的转换。首先，作者以文本解读的方式整理了国内学界典型的私生活权研究的原创性作品和翻译作品。虽然这些作品在数量上不多，但对于我们的私生活权保护研究具有重要的借鉴意义。其次，作者对“隐私”概念进行了进一步分析，通过剖析“隐”和“私”作为隐私概念的分解因素，揭示了在私生活权保护上由“隐核心”向“私核心”转变的过程，论证了现代社会私生活利益的保护重心在“私”的命题，也证成了“私核心”的隐私（权）研究其实就是另一形式的私生活权研究。

在第三章中，作者评述了美国保护私生活权的法律制度，探讨了私生活权的概念界定、美国法中的私生活权不是什么。首先，作者从美国宪法、普通法和成文法三个方面介绍了美国法律对于其私生活权的法律保护。其次，作者评述了美国学界的六种私生活权概念界定方法——独处的权利说、限制接近说、秘密说、个人信息控制说、亲密关系说和人格保护说，认同了人格保护说的私生活权概念方法，并对人格保护说的“术语终结”进行辩解和论证。最后，作者批评了国内学界存在的三种私生活权与一般人格权的误解，试图通过“美国法中的私生活权不是什么”的方式更好地理解美国法中的私生活权。

在第四章中，作者探讨了私生活权本土化的立法安排和宪法基础、私生活利益保护视角下的人格权立法。首先，基于我国现行法律谱系的考虑，作者认为私生活权本土化不能以私生活权作为制度标签，进而对我国现行法中的隐私权进行了合理的定位。其次，作者认为我国宪法上存在私生活利益法律保护的基础性规范，使得我们进行私生活利益法律保护的其他制度设计成为可能。再次，作者认为我国人格权立法中应当选择“人格权一般规定＋人格权开放性”的立法模式。最后，作者认为人格权的主体应当开放，不仅仅局限于自然人和法人两类，还应到包括亲密团体。

在结语中，作者基于私生活权保护的缘起和发展均是司法先行的考虑，分析了现行我们司法实践中出现的种种乱象，提出了在人格权开放性立法模式下的新型私生活利益保护案件的司法适用方式。

关 键 词：隐私权；私生活权；一般人格权

ABSTRACT

Since the late 19th century when the Right of Privacy was proposed as a legal notion, it has become a worldwide concern in the circle of law. In contrast, attention and study on the Right of Privacy started relatively late in China. Thus, many issues arising from current legal theory and judicial practice need urgent clarification. The primary purpose of this article is to clarify and correct existing misunderstandings on the right to privacy constructed in foreign jurisdictions, and to provide some interesting reflections on localization of legal protection for the rights.

In preface, in order to avoid abruptness caused by translating 'Privacy' as *Sishenhuo (quan)*, the author argues that the precise corresponding word of 'Privacy' in Chinese should be '*Sishenhuo(quan)*' based on semantic research on related words and expressions in western languages, the consistency among interpretations of international human rights documents, and the inconsistency between the expressions of S*ishenhuo* and *Yinsi* in Chinese official documents.

In chapter 1, the author discusses the genesis of the term *Yinsi*, the formation of the concept *Yinsi(quan)*, and the trend towards pro-restrictive interpretation and sectionalisation on privacy in domestic scholarship. The main arguments develop as follows. Firstly, neither *Yinsi* can be found in ancient Chinese, nor it was purely created as the Chinese counterpart for the imported term privacy. *Yinsi* is a new concept constructed by selecting and combining the two Chinese words *Yin*(hidden) and S*i*(private). Secondly, although scholars nominally adopted the expression *Yinsi-quan* in earlier days, it was usually linked to protection of interests in private life. In terms of the nature of the right, most scholars were apt to define it as a basic human right to the protection of dignity and freedom, which was generally in consistent with western counterparts. Thirdly, western doctrine of privacy was restrictively studied in earlier domestic scholarship –the study on privacy was generally narrowed into fields of tort law and personal right law.

In chapter 2, the author discusses domestic research on the Right of Privacy and

the transformation of the core of *Yinsi(quan)*. Firstly, by text interpretation, the author sorts out typical domestic original works and translations which cover the Right of Privacy. Though the number is limited, they constitute an important reference for us to study protection of the Right of Privacy. Then the author provides further analysis on the concept of *Yinsi* and illustrates the transformation from *yin*(hidden) to '*si*' (private) as the core of privacy. The argument builds on the analysis of *yin* and *si* as decomposition elements of the concept of *Yinsi*, *Yin*(hidden) as its core, and *Si*(private) as its core, and demonstrates that *Si*(private) oriented study on *Yinsi(quan)* is essentially a disguised version of study on privacy.

In chapter 3, the author discusses the law of protection to the right of privacy in America, and the conceptualization of the right of privacy, and what doesn't the right of privacy mean. Firstly, the author introduces this legal protection from American Constitution, the Common law and statute. Secondly, the author introduces and discusses the six methods of conceptualization of the right of privacy used by America academia: "the right to be alone", "limited access to be self", "secrecy", "control over personal information", "intimacy", and "protect personhood". The thesis agrees with the view of "protect personhood", what's more, the thesis justifies and demonstrates "normative end of privacy" of this method. Lastly, the author criticizes the three misunderstandings to the right of privacy in the domestic academia, and makes a try to understand this right better over the way of "what doesn't the right of privacy mean".

In chapter 4, the author discusses the legislative arrangement and the constitutional foundation of localization of the right of privacy, the legislation of personal right from the perspective of protection to interests in private life. Firstly, the thesis argues that the localization shouldn't tag with the right of privacy, and then locate *Yinsi-quan* of our legal system rationally. Secondly, the author holds that the foundational rules in the Constitution of The People's Republic of China make it possible to make system design to protect the interests in private life. Thirdly, the author argues that we should choose the "general provision of personal right and the open of personal right" model in the legislation of personal right. Lastly, the author

thinks the subjects of the personal right should be open, it should include but not limit natural person, person in legal and intimate group.

In postscript, the author argues that the juridical practice goes ahead of the genesis and development of the right of privacy, analysis the various disorders in our judicial practice, and then proposes the way of judicial application to protect the non-typified interests under the open model of the legislation of personal right.

Key Words: *Yinsi-quan*(Rights to Privacy); Rights of Privacy;General Personal Rights

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